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No. 90-1127

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The briefs of the "Federal Respondents" [1] and the "Private Respondents" [2] in opposition to the petition of "Rail Labor" [3] for review of the decisions of the United States Court of Appeals for the District of Columbia Circuit in *Railway Labor Executives' Ass'n v. ICC*, 914 F.2d 276 (D.C. Cir. 1990) and *Railway Labor Executives' Ass'n v. ICC*, D.C. Cir. No. 89-1436 (October 30,

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[1] The United States of America and the Interstate Commerce Commission ("ICC" or "Commission").

[2] The Chicago and North Western Transportation Co. ("CNW"), Fox River Valley Corporation ("FRVR"), Itel Corporation ("ITEL"), Itel Rail Corporation ("Itel Rail"), CSX Transportation Inc. ("CSXT"), and Buffalo & Pittsburgh Railroad, Inc. ("B&P").

[3] The Railway Labor Executives' Association ("RLEA") and the United Transportation Union ("UTU").

1990) have misunderstood the holdings and the import of the decisions of this Court which were relied upon by Rail Labor and with which the decisions below conflict. Accordingly, this reply brief is respectfully submitted pursuant to Rule 15.6 of the Rules of this Court.

RESPONDENTS' ARGUMENTS AGAINST THE PETITION IGNORE THE BROAD HOLDINGS OF SEVERAL PRIOR DECISIONS OF THIS COURT WITH WHICH THE DECISIONS BELOW CONFLICT

This petition concerns two transactions that exemplify a recent practice in the railroad industry by which corporations that own or control rail carriers acquire additional rail lines that connect with existing subsidiary railroads to create interlocking rail systems, without ICC approval of the acquisitions under Sections 11343 and 11344 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 11343 and 11344. These provisions govern sales of rail lines by carriers to other carriers or to corporations which control carriers, and such sales cannot be effected without provision of employee protective arrangements under 49 U.S.C. § 11347. Corporate rail systems have evaded the requirements of those provisions by forming new subsidiaries to effect the acquisitions under 49 U.S.C. § 10901, which has been held to govern acquisitions of rail lines by non-carriers and has no mandatory employee protection obligation. While the parent corporations have sought approval under Sections 11343 and 11344 of their continued control over the subsidiaries that acquired the additional rail lines (or exemption from such approval), the scope of those proceedings, as well as the scope of employee protections attached thereto, have been limited by the filing for authorization or exemption of the control relationships under separate "Finance Dockets" from the acquisitions, creating separate proceedings concerned only with the common control of multiple carriers.

The net result of this maneuvering was to avoid Commission scrutiny of the *acquisitions* under Sections 11343

and 11344 and to deny employee protective benefits to individuals who worked on the acquired lines which would have been mandatory had the acquisitions been effected under Sections 11343 and 11344. Rail Labor has challenged the Commission's sanctioning of this evasion of Sections 11343 and 11344 as in direct conflict with decisions of this Court that regulation under those provisions cannot be limited or determined through the use of subsidiaries and other corporate devices, or by the form in which transactions are presented to the Commission. *See United States v. Marshall Transport Co.*, 322 U.S. 31 (1949); *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 156 (1957); *County of Marin v. United States*, 356 U.S. 412 (1958); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

Respondents dispute any conflict between the court of appeals' decisions and this Court's decisions asserting that, in the instant cases, there was no evasion of ICC regulation of an acquisition under Section 11343, because the ICC applies that provision to the control relationships created by the acquisitions, that none of the decisions cited by petitioners involved employee protection conditions and that none of them involved the issue of whether a carrier can acquire a rail line under Section 10901 rather than under Section 11343. Brief for Federal Respondents at 11-12, Brief for Private Respondents at 13-14. Respondents also assert that the D.C. Circuit's decisions are consistent with decisions of other circuits which affirmed the ICC's view that the acquisition of a rail line by a subsidiary or affiliate of a carrier is a non-carrier acquisition, even if the new line connects with a line owned by an affiliate, so long as the new subsidiary satisfies an ICC test of certain minimal indicia of independence, as well as decisions which held that Section 11347 obligations were limited to carriers actually participating in the transaction in which they were imposed. Brief for Federal Respondents at 13-14, Brief for Private Respondents at 17.

1. Respondents have not refuted Rail Labor's showing that the court of appeals' decisions conflict with the *Marshall Transport* line of cases. Contrary to Respondents' assertions, the applicability of those decisions to the instant cases is not diminished because none of those cases involved employee protection or questioned whether an acquisition was properly considered under Section 11343 (then Section 5) or Section 10901 (then Section 1(18)). Respondents' narrow reading of those decisions simply ignores the Court's analysis of the language of the ICA and its history, which were the bases for its holdings; this Court spoke broadly and forcefully concerning the general interpretation and application of then Section 5, holding that carriers and corporations which controlled carriers could not evade regulation under Section 5, or dictate the results of regulation under Section 5 through the use of subsidiaries and holding companies.

In *Marshall Transport*, the determination that a parent corporation was required to obtain Commission approval of its acquisition of a carrier through a subsidiary was based upon the principle that application of Section 5 must depend upon the actual nature and practical effects of a transaction. Accordingly, despite the subsidiary's application for authorization of the acquisition, the parent was required to obtain such authorization because the effect of the transaction was that the parent had acquired control over another carrier. 322 U.S. at 32, 35-37, 41-42. In *County of Marin*, the Court held that the ICC lacked jurisdiction over a transfer of operating rights between a parent and a subsidiary formed for the purpose of effecting the transfer because, in actuality, the transaction was a transfer of operating rights by a corporation to a wholly-owned "corporate shell" in an essentially "paper transaction" for the purpose of invoking ICC Section 5 jurisdiction to avoid state regulation. 336 U.S. 418-419. That holding was based upon the principle that Commission processes may not be manipulated through corporate devices, but rather must be guided

by the actual nature and practical effects of transactions within its jurisdiction. *Id.*

This analysis of the proper functioning of Section 5 was forcefully reiterated in *Gilbertville Trucking Co.*, in which this Court explained that an expansive reading of Section 5 was required by the language of that provision, and especially by the history of successive amendments to Section 5, specifically to prevent evasion of Section 5 through artificial structuring of transactions through elaborate corporate devices used to obtain control over railroads without Commission supervision through the use of "the holding company system." 371 U.S. at 124-25. Accordingly, contrary to the assertions of respondents, the *Marshall Transport* line of cases may not be limited to their specific facts, nor do those decisions merely recognize broad Commission discretion with respect to enforcement of Sections 11343 and 11344. The Court established fundamental principles which govern Commission consideration of all transactions involving acquisitions of rail lines and held that the Commission must aggressively scrutinize transactions within its jurisdiction to insure that those provisions are properly applied and enforced.[4]

2. Rail Labor submits that the decisions below conflict with *Marshall Transport* and its progeny because the Commission ignored the realities of the corporate relationships and the practical effects of these transactions.

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[4] Contrary to the implication in the Brief of the Federal Respondents (at 9-10) and the Brief of the Private Respondents (at 3), this does not mean that enforcement of Sections 11343 and 11344 in such cases depends upon findings that subsidiaries are *alter egos* of their parents or affiliates, or that the ICC "must pierce the corporate veils between parent and subsidiary," as those terms are used in corporate law. As is set forth in Rail Labor's petition (at 19-20 n.5), enforcement of federal law can require that corporate formalities be ignored even if they are valid under state law, and the actions of a federal agency to enforce federal law neither render a corporation illegitimate nor undermine its separate status under state law.

These transactions allowed corporations that control rail carriers to acquire additional rail lines which connect with existing subsidiaries without Commission authorization or exemption of the acquisitions under Sections 11343 and 11344, and without provision of statutorily mandated employee protective arrangements for the employees affected by the acquisitions: the employees who worked on the lines which were acquired.

The Federal Respondents' brief actually demonstrates the conflict between the decisions below and the decisions of this Court in asserting that "while the ICC is *permitted* in an acquisition transaction to look beyond a non-carrier subsidiary's independent corporate form in order to prevent evasion of the statute's purpose, the ICC is not *required* to do so where a subsidiary was formed for bona fide business reasons and has sufficient indicia of operational and financial independence." Brief for Federal Respondents at 12 (emphasis in original). This argument is directly contrary to the principles of the *Marshall Transport* line of cases which hold that the ICC is *required* to look beyond the separate corporate status of a subsidiary and to the true nature and practical effects of transactions within its jurisdiction to prevent the use of holding companies and subsidiaries to evade or determine regulation under Section 5, regardless of whether a subsidiary is a bona fide corporation and will operate independently of its parent and affiliates. Thus, in *County of Marin*, this Court held that the ICC erred in assuming Section 5 jurisdiction over a transaction between a parent and a subsidiary because of the nature of the relationship between the parent and the subsidiary and the practical effects of the transaction; indeed, the Court never questioned the corporate bona fides of the subsidiary and specifically did not consider whether there were "financial or operational justifications for the proposed transactions." 356 U.S. at 418.

County of Marin best demonstrates the conflict between the decisions below and the precedent of this Court, for

if the ICC's method of analysis was applied in *County of Marin*, the Commission could have assumed jurisdiction over the operating rights transfer in that case on the basis that the subsidiary was a bona fide corporation under state law and it satisfied the Commission's indicia of independence test. However, the separate corporate status of the subsidiary and its plans to operate independently of its parent were insufficient to treat it as separate from its parent for Section 5 purposes. Whereas *County of Marin* involved the use of a subsidiary to invoke Section 5 jurisdiction, and the instant cases involve the use of subsidiaries to evade Section 5 jurisdiction, the same rule must obviously apply in both situations, especially since *County of Marin* relied upon the principles first established in *Marshall Transport*, which involved an attempt to evade Section 5 jurisdiction.

The Federal Respondents assert an absence of conflict between the decisions below and *Marshall Transport* and its progeny because the parent corporations sought Commission authorization of their continued control of the newly-formed subsidiaries. This assertion is clearly without force because, under the Commission's practice of bifurcating related control and acquisition proceedings, the control decisions focus only on the issue of the parent corporations' common control of more than one carrier, and not on the parent corporations' acquisitions of additional rail lines to extend existing corporate rail systems through the newly-formed subsidiaries. Additionally, this argument is completely at odds with the Commission's holdings that employees of the selling carriers were not covered by the protective conditions imposed in the control proceedings because the selling carriers were not involved in the control proceedings; if the Commission actually authorized the parent corporations' acquisitions of additional rail lines in the control decisions, it could not possibly have held that the sellers of those rail lines were not involved in the control proceedings. Thus, the Commission either failed to apply the principles established in

Marshall Transport, or its holdings that the selling carriers were not involved in the control proceedings were directly contrary to Section 11347.

The fact that a substantial reason for Rail Labor's challenges to these transactions was the denial of statutory employee protective benefits does not mitigate the need for review by this Court to resolve the conflict between its precedent and the decisions below. If a transaction is subject to Sections 11343 and 11344, employee protection arrangements are not a matter of ICC discretion, rather they are mandatory pursuant to Section 11347. Accordingly, the relative merits of requiring such protective arrangements is not a factor in deciding whether a transaction must be approved under those provisions or affirmatively exempted from such approval. However, the fact that a significant purpose of evasion of Sections 11343 and 11344 was to escape Section 11347 employee protection obligations further illustrates the need for strict application of those provisions as is required in *Marshall Transport* and its progeny.[5]

Rail Labor submits that Respondents' observation that two other circuits have affirmed the ICC's view that acquisitions of rail lines by newly-formed controlled entities may be accomplished under Section 10901 does not diminish the force of Rail Labor's showing of a conflict between the decisions below and the precedent of this

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[5] The Federal Respondents' observation that the legislative history of the ICA shows that the scope of Sections 11343 and 10901 was determined prior to the enactment of employee protection requirements so there is no evidence of Congressional intent to make the protections applicable to a broader class of transactions (Brief for Federal Respondents at 12 n.16) is simply irrelevant. It is not Rail Labor's position that these acquisitions must be considered Sections 11343 transactions because employee protections are desirable; rather, Rail Labor contends that the acquisitions are Section 11343 transactions under the language of the statute and precedent of this Court so that employee protective arrangements are therefore mandatory.

Court. Like the court below, neither of those courts of appeals addressed the *Marshall Transport* line of cases. Rail Labor further submits that rather than supporting a denial of Rail Labor's petition, the consistency among the decisions of these courts of appeals actually demonstrates the need for this Court to resolve the conflict between its prior decisions and the reasoning of the courts of appeals.

3. Even if the Commission was not required to treat the acquisitions by FRVR and B&P as acquisitions by carriers, the decisions below still conflict with the *Marshall Transport* line of decisions by holding that CNW and CSXT were not "involved," within the meaning of Section 11347, in the control transactions which were inextricably intertwined with the sales of their lines and which were necessary only because of those line sales. By treating the proceedings on the acquisitions and the control relationships as entirely separate because they were filed under separate Finance Dockets, the Commission simply ignored the true nature and practical effects of those transactions and allowed the form in which the transactions were presented to control the outcome of regulation. However, the Commission was required to look beyond the manner in which the transactions were presented, and its determinations that CNW and CSXT were not involved in the control transactions were in conflict with the principles established in *Marshall Transport*.[6]

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[6] Contrary to the assertions of the Federal Respondents (at 13-14) and the Private Respondents (at 16-17), the fact that various courts of appeals have rejected attempts to apply employee protections imposed in mergers to employees of non-party competitor railroads does not demonstrate the validity of the decisions below or refute Rail Labor's assertions that they conflict with precedent of this Court. The merger cases are easily distinguishable from the instant cases because the selling carriers were clearly involved in the control relationships which were necessitated by the acquisitions, and which made the sales possible. Indeed, Rail Labor's argument

Indeed, those decisions should have carried special force in the context of application of employee protective conditions since Section 11347 is a remedial statute designed to protect employees who are adversely affected by transactions which are subject to ICC approval. As such, Section 11347 should be broadly construed in the context of the overall transaction effected and not be subject to evasion through sophisticated manipulation of the provisions of the ICA. Such machinations can only result in the inequities and inefficiencies which this Court recognized Congress sought to avoid when the "just and reasonable treatment of railroad employees" and the "demands of justice" are ignored. *United States v. Lowden*, 308 U.S. 225, 235-38 (1939).

CONCLUSION

Respondents have not demonstrated an absence of conflict between the decisions below and the precedent of this Court. Rather, their arguments only clarify that conflict and the need for this Court to address the questions raised in Rail Labor's Petition. Accordingly, Rail Labor respectfully submits that the petition should be granted.

Respectfully submitted,

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on this point is that the acquisitions and the control authorizations were essentially single transactions carried out in two steps so that the selling carriers were necessarily involved in the control authorizations.